United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

Orig w/ affidavit of mailing

76-1100

To be argued by
VICTOR J. ROCCO

United States Court of Appeals

FOR THE SECOND CIRCUIT

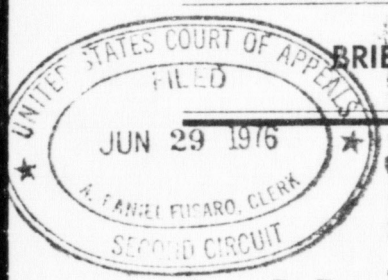
Docket No. 76-1100

UNITED STATES OF AMERICA,
Appellee,

—against—

PAUL V. OATES,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



BRIEF FOR THE UNITED STATES

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Preliminary Statement

Paul V. Oates appeals from a judgment of the United States District Court for the Eastern District of New York (Bramwell, *J.*), entered March 1, 1976, convicting appellant, after a jury trial, of conspiracy, 21 U.S.C. § 846, and possession of heroin with intent to distribute, 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2, arising out of the seizure of approximately 485 grams of heroin by federal agents at La Guardia Airport on the morning of April 27, 1972. Pursuant to the judgment of conviction, appellant was sentenced to concurrent terms of imprisonment of eight years plus a special parole term of five years on Counts One and Two of the indictment, and a fine of $5,000 on Count One. Appellant has been admitted to bail pending a determination of this appeal.

Appellant assigns error to the judgment below and urges that the conviction be reversed and a new trial

ordered. Specifically, appellant assails the judgment of conviction on the grounds that the trial court committed reversible error: (1) in denying his motion, pursuant to Rule 41(f) of the Federal Rules of Criminal Procedure, to suppress evidence seized at the time of his arrest; and (2) in admitting into evidence, over his objection, a chemist's report on the heroin seized. As a further and independent ground for relief, appellant challenges the trial court's refusal to charge the jury on the question of reasonable doubt in the precise form that he requested.

Statement of the Case

Prior Proceedings

On May 4, 1972, an indictment was returned by a grand jury sitting in the Eastern District of New York charging appellant in a two count indictment with conspiracy to possess with intent to distribute approximately 485 grams of heroin, 21 U.S.C. § 846, and possession of a like quantity of heroin with intent to distribute, 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2. Named as a co-defendant on both counts of the indictment was one Isaac Daniels. Appellant and his co-defendant subsequently entered pleas of not guilty to the indictment before the Honorable Leo L. Rayfiel and a trial date was scheduled by the court for September 12, 1972. On the scheduled trial date, appellant and his co-defendant entered pleas of guilty to the second count of the indictment. The sentence of the court followed and appellant was sentenced to a term of imprisonment of eight years plus a five year special parole term.[1] Applications for leave to withdraw the

[1] On his plea of guilty, Isaac Daniels was sentenced to a term of imprisonment of three years plus a five year special parole term. Appellant's sentence was subsequently modified by the sentencing court and appellant was resentenced pursuant to 18 U.S.C. § 4208(a)(2).

plea of guilty pursuant to Rule 32(d) of the Federal Rules of Criminal Procedur and 18 U.S.C. § 2255 followed the imposition of sentence, and on June 25, 1974 the judgment of conviction was vacated, after a hearing, and appellant's former plea of not guilty reinstated by the sentencing court.[2] The matter was reassigned to the Honorable Henry Bramwell for trial which began on January 5, 1976. A hearing on defense motions to suppress certain evidence and admissions preceded commencement of the trial proper. Following an evidentiary hearing, those motions were denied (SH 304).[3]

Statement of Facts

At approximately 7:00 P.M. on the evening of April 26, 1972, Special Agent Garfield Hammonds, Jr. of the then Bureau of Narcotics and Dangerous Drugs ("BNDD"), New York, entered Gate # 19 at the American Airlines Terminal, Detroit Metropolitan Airport, to re-validate his ticket prior to a return flight to New York's La Guardia Airport later that evening (SH 22-23; T 41). Upon entering the terminal Agent Hammonds, formerly assigned to the Detroit Office of BNDD, observed two black males seated and engaged in con-

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[2] Appellant's original motion to withdraw the plea of guilty was founded on a claim that he was under the influence of heroin at the time of his plea. That motion was denied following an evidentiary hearing on March 7, 1973. A second such application was granted by Judge Rayfiel on the ground that appellant misapprehended his right to proceed against an unrelated Michigan indictment that had been transferred to the Eastern District of New York pursuant to Rule 20 following an agreement that the Government would recommend that the sentence run concurrently with the sentence imposed on the Eastern District offense.

[3] Unless otherwise indicated, page references proceeded by SH refer to the suppression hearing transcript; those proceeded by T refer to the trial transcript.

versation, one of whom he immediately recognized as Paul V. Oates, a documented major narcotics trafficker in the Detroit metropolitan area (SH 23)[4] and a "target" in a general narcotics investigation in which Hammonds had participated (SH 54-55). Agent Hammonds continued his observations of appellant, who he recognized from photographs, and the second black male, later identified as Isaac Daniels. As their flight was announced (SH 27; T. 43) appellant and Daniels separated and boarded American Airlines flight # 440 for New York and proceeded to occupy different sections of the aircraft: Oates occupying a seat in first class and Isaac Daniels occupying a seat in coach (SH 27-28; T 43-44).

On boarding the plane, Hammonds took a seat directly across the aisle from Daniels and, during the flight to New York, observed what appeared to be "track" marks on the back of Daniels' right hand (SH 30; T 45-46).[5] Alighting from the plane in New York at approximately 10:00 P.M., Agent Hammonds observed Oates and Daniels rejoin in the jetway and engage in conversation. Upon reaching the exit ramp (SH 32-33; T 48, 50), appellant exchanged greetings with a third black male, William Charles McMillan, a deactivated government informant, then known by Agent Hammonds

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[4] The hearing court refused to admit testimony that, at the time of his observations, Agent Hammonds knew that appellant was under indictment in Detroit for an alleged violation of the federal narcotics laws. (SH 31). Agent Hammonds knew of appellant's narcotics dealings through BNDD intelligence information and information supplied by the Detroit Police Department and Wayne County Sheriff's office (SH 23).

[5] During the flight to New York Hammonds noticed that Daniels' nose was running continually and that his hands were swollen (SH 30; T 45-46), characteristics which he described, based on his undercover experience (T 45-46), as typical of heroin addicts (Id.).

also to be actively engaged in drug trafficking.[6] As they proceeded down the ramp neither Daniels nor Oates was carrying luggage, though Oates was apparently in possession of a brown shopping bag (SH 26; T 49). Agent Hammonds then observed McMillan enter a telephone booth off the exit ramp in the terminal (SH 35; T 51), dial the phone and hand the receiver to Oates who, joining McMillan in the booth, proceeded to close the door behind them (SH 35, 66-67; T 51-52). Daniels meanwhile had positioned himself outside the booth a bit to the left (SH 35, 67; T 52).

Fearful that McMillan might recognize him (SH 36, 67; T 53), Hammonds terminated the surveillance and approached the American Airlines information desk where he inquired about the next flight to Detroit. Advised that the next flight was scheduled for 7:55 A.M. the following day (SH 36; T 53-54), Agent Hammonds left the terminal and reported to his office. He disclosed his observations to his Assistant Group Supervisor who, in turn, authorized a surveillance at the American Airlines

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[6] Evidence of McMillan's prior informant status was not introduced at the suppression hearing. Testimony to that effect, however, was adduced at trial (T 279-280, 297-298, 355-356). In addition, the court had before it, in the form of McMillan's informant file, intelligence information provided by McMillan in 1970 concerning appellant's drug contacts in New York. A copy of the informant file was filed with the court during trial, ordered sealed and marked Court Exhibit 2. A redacted version of that file, containing intelligence information regarding Paul Oates' New York drug connections, was made available to the defense at trial. (T 132). A copy of the redacted version of the informant file is set forth in the Government's Appendix. It is, of course, well established that the validity of an arrest or search can be established by evidence adduced at trial though not adduced at the suppression hearing. *Carroll* v. *United States*, 267 U.S. 132, 162 (1925); *United States* v. *Canieso*, 470 F.2d 1224, 1226 (2d Cir. 1972).

Terminal at La Guardia the following morning (SH 37, 69).

Between 7:10 and 7:15 A.M. on April 27, the next day, Agent Hammonds, accompanied by fellow BNDD agents, instituted a surveillance at Gate # 10 at the American Airlines Terminal, the departure gate for the early-morning Detroit flight (SH 39; T 55). At the time the surveillance was initiated Oates and Daniels were already in the departure lounge. Oates was seated with his back to the corridor facing Daniels who was seated diagonally across from Oates some 15 feet away. The subjects exhibited no sign of recognition and made no discernible attempt to communicate (SH 74; T 56-57). When Agent Hammonds positioned himself in the corridor directly behind Oates he noticed a large bulge about the area of Daniels' right coat pocket. Hammonds then entered the lounge and occupied an empty seat next to Daniels (SH 40; T 59); and upon taking his seat, noticed a second bulge on the inside of Daniels' right thigh. Concerned that Daniels may have been armed as well as carrying narcotics, Agent Hammonds left his seat in the lounge and dispatched a member of the surveillance team to airport security for assistance in a weapons and identification check (SH 41; T 60-61).

Shortly thereafter, two uniformed Customs Security Officers, Kerry Fromkin and Arthur DeAlfi, members of the sky marshal's unit, were advised of the BNDD observations earlier that morning and the night before and were asked to proceed to Gate # 10 to assist in identification checks of the subjects (SH 43; T 61-62). On their arrival at Gate # 10 the customs officers were briefed by Agent Hammonds who advised them that he had reason to believe that the suspects were armed and carrying narcotics. Oates and Daniels were identified and the customs officers were asked, for security reasons, to conduct an

identification check.[7] The customs officers made independent observations of the suspects during which they noticed the large bulge in the area of Daniels' right coat pocket that Agent Hammonds had described (SH 107, 148). Boarding for the flight was announced and while on the boarding line, with their tickets in hand, Oates and Daniels were approached by customs officers who identified themselves and asked the suspects to accompany them to a nearby American Airlines office.[8] Both suspects were nervous, "acting jittery, looking around." (SH 110).

Appellant and Daniels were then escorted to a nearby office and asked whether they were armed and to produce identification (SH 112). Oates produced a driver's license (SH 112); Daniels could produce no identification (SH 151). Both suspects denied being armed (SH 112). There followed a "pat down" of Oates during which Officer Fromkin looked into a brown shopping bag which Oates was carrying (SH 112; T 164) with negative results (*Id.*). Officer DeAlfi proceeded with a pat down of Daniels, during which he felt a bulge on the inside of Daniels' right thigh.[9] Asked what the bulge was

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[7] Agent Hammonds testified during the suppression hearing that prior to seeking the assistance of airport security he had decided to place appellant and Daniels under arrest (SH 41, 85-86). Because the departure lounge was crowded, Hammonds decided against immediate action and sought uniformed assistance instead (SH 41). Agent Hammonds' intention to arrest the suspects, consequently, was never communicated to his fellow agents or to the customs officers who responded to the request for assistance (SH 86).

[8] Officer Fromkin testified that in April of 1972, magnetometers were used only in FAA designated high-risk flights. (SH 109). To the best of his recollection, a magnetometer was not in use for the Detroit flight at Gate #10 on the morning of April 27, 1972.

[9] Before reaching Daniels' leg during the "pat down" DeAlfi felt a large bulge in Daniel's right coat pocket. Unsure of what it was (SH 151), he removed what proved to be an overstuffed wallet (SH 151-152).

Daniels responded "powder" at which point Officer DeAlfi asked Daniels to remove it. Daniels unbuckled his pants and produced a package containing a white powdery substance (SH 113; T 165). At that point, BNDD Agents placed appellant and Daniels under arrest for violation of the federal narcotics laws.

Though subsequent to his arrest appellant denied knowing Daniels (T 415), evidence was introduced at trial that he had purchased their round trip tickets between Detroit and New York on April 26, 1972 (T 378-380, 410). William Charles McMillan, called on behalf of the Government, testified that he had met with appellant and an unknown black male at La Guardia Airport on the evening of April 26, 1972 where he made telephone arrangements for the purchase of narcotics later that evening. Upon leaving the airport, McMillan, accompanied by Oates and Daniels, proceeded into Brooklyn in search of the "source" and then into Manhattan (T 288-290) where the deal was apparently effected some time later that night (T 295-296).

ARGUMENT

POINT I

The warrantless search and subsequent seizure of the heroin was founded on probable cause.

Appellant initially contends that the trial court erred in denying defense motions to suppress the heroin seized as a result of the search of Isaac Daniels at La Guardia Airport on the morning of April 27, 1972.[10] Given the

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[10] The discussion that follows proceeds on the assumption that appellant has standing under the automatic standing rule enunciated in *Jones* v. *United States*, 362 U.S. 257 (1960), to challenge the search of Isaac Daniels' person, though he alleges

[Footnote continued on following page]

no proprietary interest in the contraband seized as a result of that search. *See United States* v. *Boston*, 510 F.2d 35 (9th Cir. 1974), *cert. denied*, 421 U.S. 990 (1975). Under that rule a defendant has standing to contest the subject search where he is charged with an offense in which possession at the time of the search is an essential element of the crime. *See Brown* v. *United States*, 411 U.S. 223 (1973); *United States* v. *Tortorello*, ——— F.2d ——— (2d Cir. Slip op. 2879 [April 1, 1976]. In light of independent constitutional innovation, see *Simmons* v. *United States*, 390 U.S. 377, 390 (1968), the automatic standing rule has since been seriously questioned in *Brown* and is of "dubious validity." *United States* v. *Pui Kan Lam*, 483 F.2d 1202, 1205, n.4 (2d Cir.), *cert. denied*, 415 U.S. 984 (1973). Indeed, after *Simmons* all that remains of the Supreme Court's rationale in announcing the rule is the so-called vice of "prosecuted self-contradiction," described in the following excerpt from *Jones*:

> "Petitioner's conviction flows from his possession of the narcotics at the time of the search. Yet the fruits of that search, upon which the conviction depends, were admitted into evidence on the ground that petitioner did not have possession of the narcotics at that time. The prosecution here thus subjected the defendant to the penalties meted out to one in lawless possession while refusing him the remedies designed for one in that situation. It is not consonant with the amenities, to put it mildly, of the administration of criminal justice to sanction such squarely contradictory assertions of power by the Government." 362 U.S. at 263-64.

Subsequent judicial gloss on the doctrine in *Brown*, however, has limited the purported "self-contradiction" to instances where possession at the time of the search is an essential element of the crime. 411 U.S. at 229. Though the substantive offense may be a possessory crime, charges, as here, of conspiracy and aiding and abetting unquestionably are not. *See e.g. United States* v. *Boston, supra*, 510 F.2d at 37; *United States* v. *Valencia*, 492 F.2d 1071 (9th Cir. 1974); *United States* v. *Sacco*, 436 F.2d 780 (2d Cir.), *cert. denied*, 404 U.S. 834 (1971). Under the circumstances, it is difficult to perceive how appellant satisfies the essential element requirement established in *Brown;* or, for that matter, how the Government is guilty of the "vice of prosecutorial self-contradiction," of concern to the Supreme Court in *Jones*, and as to which the Court expressly reserved decision in *Brown*.

In any event, it is the Government's position that the "con-

[Footnote continued on following page]

totality of circumstances in which it was executed, the search of Daniels was lawful since the Customs Security Officers, acting on their prior observations and information provided by the BNDD agents had probable cause to believe that Daniels was armed and in possession of narcotics. It was only after Agent Hammonds, who had followed the suspects into New York late the night before, saw bulges inside Daniels' right thigh and right coat pocket that Daniels was subjected to the limited search during which the heroin was found. At that point, given appellant's narcotics background and both suspects activity the night before, probable cause existed to justify the search. The district court properly denied the motion to suppress.

Probable cause, as the term necessarily implies, is more than suspicion but patently less than proof beyond a reasonable doubt. *Draper* v. *United States*, 358 U.S. 307, 311-312 (1959); *United States* v. *Rodriguez*, — F.2d — (2d Cir. Slip op. 2585, 2590 [March 11, 1976]). It involves probabilities founded upon the factual and practical

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tradiction" assailed in *Jones* is more apparent than real. The fourth amendment, as far as we know, confers no "remedies" on one who is in the position of being a lawless possessor of property. Cf. *Brown* v. *United States*, *supra*, 411 U.S. at 230. All the prosecution is saying, on the one hand, is that the party charged is a lawless possessor who lacks standing to complain about a seizure of property which otherwise did not invade his privacy; and, on the other, that he should be punished because of his lawless possession. The positions are perfectly consistent. *See Trager* and *Lobenfeld, The Law of Standing Under the Fourth Amendment*, 41 Bklyn. L. Rev. 421, 436 (1975).

Appellant's standing was challenged below (SH. 8-20) and is treated here in a footnote only because the merits of the appellant's claims are so frivolous that the Court need not reach the broader, and perhaps more important issues that inhere in the question of the continued viability of the automatic standing rule. *See United States* v. *Tortorello*, *supra*, Slip op. at 2887, n.4.

considerations of everyday life. In a word, it requires no more than a showing of knowledge of specific facts and circumstances sufficient to warrant a prudent man, not a legal technician, in believing that an offense is being or has been committed. *Brinegar* v. *United States*, 338 U.S. 160, 175 (1949); *Beck* v. *Ohio*, 379 U.S. 89, 91 (1964). Each such case, of course, must be decided on its own facts.

The circumstances preceding the search of the suspects provided adequate justification for the conclusion that a crime was being committed at La Guardia Airport on the morning of April 27, 1972 and for the search—limited initially to a pat down—to discover evidence of that crime. First there were the observations of Agent Hammonds who prior to a return flight to New York the night before happened to observe appellant and Isaac Daniels in conversation at Detroit Metropolitan Airport. On the basis of intelligence information previously supplied by the Detroit authorities (SH 23) and a narcotics investigation in which he had participated (SH 55), Hammonds recognized appellant as Paul Oates, a major narcotics trafficker—hardly, as appellant would have it, a bald and unilluminating assertion of suspicion.[11] As boarding for the flight to New York was announced, Agent Hammonds observed Oates and Daniels separate and proceed to different sections of the plane.

On arrival at LaGuardia, at approximately 10:00 P.M., Hammonds observed appellant and Daniels rejoin

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[11] Even assuming that Agent Hammonds' testimony aptly could be characterized as a mere statement of suspicion, the law has developed to the point where police suspicion as to suspect's criminal reputation is one factor to be considered in determining whether probable cause exists. See *United States* v. *Harris*, 403 U.S. 573, 582 (1971); *United States* v. *Tramunti*, 513 F.2d 1087, 1101, n.19 (2d Cir. 1975); *United States* v. *Canieso*, *supra*, 470 F.2d at 1231; *United States* v. *Lampkin*, 464 F.2d 1093 (3rd Cir. 1972).

in the jetway and meet with William Charles McMillan, a former informant for his office (T 51), and at that time known by Agent Hammonds to have substantial drug contacts in the New York area (SH 34).[12] While in the American Airlines terminal, Hammonds observed Oates and McMillan exchange greetings and proceed down the exit ramp to a telephone booth. McMillan entered the booth and, after dialing the phone, was joined in the booth by appellant who closed the door behind him. All the while Daniels stood idly nearby.

These circumstances were enough to arouse agent Hammonds' suspicions that Oates and his companion were not in New York on an ordinary errand, but one involving narcotics. And his suspicions were further and justifiably aroused when Oates and Daniels were observed back at the airport early the following morning for the first flight to Detroit following their arrival. Contrary to their actions before leaving Detroit, Oates and his companion were separated while seated in the departure lounge intent on avoiding any appearance of recognition. See *United States* v. *Riggs*, 474 F.2d 699, 703 (2d Cir.), *cert. denied*, 414 U.S. 820 (1973), *citing*, *United States* v. *Canieso*, 470 F.2d 1224, 1226, 1230 (2d Cir. 1972).

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[12] That McMillan's cooperation with Agent Hammonds' office had only recently been terminated (T. 298) belies the claim that the conclusion about McMillan's drug connections was nothing more than suspicion. Though Hammonds did not describe McMillan as a deactivated informant, they undoubtedly knew each other (SH 34). Indeed, Hammond's actions at the airport were authorized by his superiors who knew of McMillan's informant status, and of the information he supplied relative to appellant's drug connections in New York. *United States* v. *Canieso*, 470 F.2d 1224, 1230, n. 7 (2d Cir. 1972), quoting, *Mullins* v. *United States*, 308 F.2d 326, 327 (D.C. Cir. 1962).

Given this confluence of events a brief investigatory stop and demand for identification would have been justified. See *Terry* v. *Ohio*, 392 U.S. 1 (1968); *Adams* v. *Williams*, 407 U.S. 143 (1972); *Gaines* v. *Craven*, 448 F.2d 1236 (9th Cir. 1971). But before accosting the suspects for even this limited purpose, Agent Hammonds observed a bulge in the area of Daniels' right coat pocket (SH 40) and a second bulge inside his right thigh (SH 40). Concluding that Daniels and Oates had participated in a purchase of narcotics that were about to be transported to Detroit for eventual distribution, and concerned that they might be armed, Agent Hammonds requested that the suspects be detained briefly for investigative purposes and checked for weapons.[13]

At that point, Customs Officers Fromkin and DeAlfi were summoned to assist Agent Hammonds, who advised them of his observations that morning and of the events of the preceding night (SH 43; T 62). Following their independent observations, during which they confirmed the bulges in Daniels' right coat pocket, the customs officers, without drawing their weapons, asked the subjects to accompany them to a nearby office (SH. 110, 130, 150). Both subjects, though appearing nervous and jittery, complied with that request (SH 110).

Relying on *United States* v. *Lampkin*, 464 F.2d 1093 (3d Cir. 1972), appellant initially contends that, given Hammonds' uncommunicated intentions, both he and

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[13]It is a well known fact that those who deal in narcotics are often armed and dangerous, *United States* v. *Weiner*, —F.2d ——(2d Cir. Slip. op. 2753, 2755 [March 24, 1976]); and that a bulging pocket may conceal a weapon. *United States* v. *Lindsey* 451 F.2d 701, 703 (3rd Cir. 1971), *cert. denied*, 405 U.S. 995 (1972). Indeed Agent Hammonds testified that over half of the narcotics arrests in which he has participated have resulted in weapons seizures (SH. 42).

Daniels were under arrest from the time they were asked to accompany the customs officers out of the departure lounge. That reliance is misplaced. In *Lampkin* federal narcotics agents approached the subjects outside the Pittsburgh Airport with their guns drawn, identified themselves as federal agents and proceeded directly to seal one of the subjects after he identified himself as Lonnie Lampkin, a suspected drug trafficker. Concluding that an arrest had been effected at the time that the agents had presented themselves with their weapons drawn, the court held that the defendant was under the control of the officers since they demonstrated an intention to take him into custody under their authority as government agents: "There was absolute restraint of appellant which was abundantly clear to him. At that instant there was an intent by the officers to arrest accompanied by a seizure or detention of the person which was so understood by the person arrested." 464 F.2d at 1095.

In contradistinction to the circumstances presented in *Lampkin*, there was no absolute seizure or restraint of Oates or Daniels at the time they were asked to accompany the customs officers to a nearby office. No show of weapons was involved, or other display of force that would warrant the conclusion that either subject was conscious of any restraint. See *United States* v. *Lampkin*, *supra*, 464 F.2d at 1095. Indeed, all that can be mustered in support of the claimed arrest is Agent Hammonds' uncommunicated (SH 41) and subsequently abandoned intention to arrest the subjects (SH 86) conjoined with the customs officers' request that they accompany them out of the departure lounge. Under the circumstances, the detention is consonant with a "brief stop of a suspicious individual in order to . . . maintain the status quo momentarily while obtaining more information." *Adams* v. *Williams*, *supra*, 407 U.S. at 146. The decision to remove the subjects from a now crowded

boarding lounge in deference to available airport security procedures, of course, cannot be faulted, and constituted, under the circumstances, the least intrusive of all alternatives. Contrary to appellant's claim, it does not *a fortiori* transform the stop into a full blown arrest. *United States* v. *Salter*, 521 F.2d 1326, 1328-29 (2d Cir. 1975), *United States* v. *Lindsey*, *supra*, 451 F.2d at 703.

Even assuming that Daniels and appellant were under arrest at the time they were asked to accompany the custom officers out of the departure lounge, probable cause existed for the arrest.[14] The question presented thus becomes whether at the moment the suspects were approched, the facts and circumstances within the officers' knowledge were sufficient to warrant a prudent man in believing that a crime was being or had been committed. *Henry* v. *United States*, 361 U.S. 98, 102 (1959). Needless to say that afterwards contraband was discovered is not enough; an arrest is not justified by what the subsequent search discloses. *Sibron* v. *New York*, 392 U.S. 40, 63 (1968).

There were, we submit, too many interrelated and telling circumstances to have been the result of mere coincidence. First, there were Agent Hammond's observations at the Detroit airport where he recog-

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[14] The Government does not claim that because the initial approach by customs officers took place at an airport only minutes prior to take off, that the protective measures were undertaken because of a threatened hijacking. Both Daniels and Oates were suspected of carrying narcotics and were possibly armed. While an airport search is not a talisman, automatically dispensing with the warrant requirement, such a search generally is not conducive to the warrant procedure. *United States* v. *Smith*, 503 F.2d 1037, 1038 (9th Cir. 1974), *cert. denied*, 420 U.S. 909 (1975). Indeed, so long as probable cause existed for the arrest, it is of no moment that the arrest in a public place was effected without a warrant. See *United States* v. *Watson*, —U.S.— 44 U.S.L.W. 4112, 4114 [January 26, 1976]; cf. *Gerstein* v. *Pugh*, 420 U.S. 103, 113 (1975).

nized appellant as Paul Oates, a known narcotics dealer consorting with a suspected heroin addict. This Court only recently in *United States* v. *Tramunti*, *supra*, 513 F.2d at 1101, N. 19, has reaffirmed the notion that under *United States* v. *Harris*, 403 U.S. 573 (1971), knowledge, as here, "that a suspect has been a narcotics dealer or offender or has consorted with a narcotics dealer may be an important element in establishing probable cause." Further cause for suspicion arose when Oates and his companion were met at La Guardia airport by a second known narcotics dealer, who upon meeting Oates entered a phone booth with him to place a phone call. Under these circumstances, Hammonds justifiably concluded that the telephone call was not a routine one and one in which both appellant and McMillan shared more than a casual interest.

When Hammonds returned to the airport the following morning, he found appellant and his companion seated in the departure lounge waiting for the first flight to Detroit. Though adjacent seats were available, contrary to their actions at the airport the night before, the suspects were now seated about 15 feet apart within each other's view, but avoiding all signs of recognition. Given these circumstances, it was reasonable to infer that appellant was attempting to avoid his companion but had no desire to allow him to leave his sight, at least until they boarded the plane. *United States* v. *Canieso*, *supra*, 470 F.2d at 1130. In view of the meeting with McMillan the night before coupled with the suspects' obvious attempts to avoid association, an experienced narcotics agent could reasonably believe further that the men had completed their business in New York and one or the other was transporting narcotics back to Detroit for distribution. *United States* v. *Lampkin*, *supra*, 464 F.2d at 1096. This inference was powerfully reinforced when Hammonds observed suspicious bulges about Daniels right

coat pocket and inside his right thigh—a telling circumstance itself. At that point, Hammonds had reasonable cause to believe that a crime was being committed, indeed that the suspects were armed as well. *United States* v. *Weiner*, *supra*, at 2755; *United States* v. *Lindsy*, *supra*, 451 F.2d at 703.

Considering all these factors, it is obvious that each incident corroborated, hence escalated the agent's existing suspicions. There were simply too many factors that fell into place. *United States* v. *Davis*, 458 F.2d 819, 821 (D.C. Cir. 1972). Probable cause, under these circumstances, seems readily apparent. See *Kerr* v. *California*, 374 U.S. 23, 34-37 (1963).

At the very least the initial detention of Daniels and Oates was lawful under *Terry* v. *Ohio*, 392 U.S. 1 (1968). A number of "specific and articulable facts" provided an adequate basis for the customs officers' suspicions to justify the minimal intrusion upon the suspects' privacy represented by the request for identification as they were boarding the flight. That the identification check was to be accompanied by a limited protective search was likewise reasonable in light of Hammonds' communicated fears that the suspects might be armed.[15] *United States* v. *Edwards*, 498 F.2d 496 (2d Cir. 1974);

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[15] While use of a magnetometer is to be preferred over the immediate weapons frisk as less intrusive, (see *United States* v. *Albarado*, 495 F.2d 799, 807 (2d Cir. 1974)), magnetometers were in limited use at La Guardia in 1972 and on the date in question none was available for use at Gate 10. The officers were thus justified under the circumstances in proceeding immediately with the "pat down." That incident to the frisk, officer Fromkin "looked" into a brown shopping bag in Oates' possession is consistent with a limited protective search since it was readily accessible to appellant and could have concealed a weapon. *Cf. Chimel* v. *California*, 395 U.S. 752 (1969); *United States* v. *Riggs*, *supra*, 474 F.2d at 70[illegible].

United States v. *Riggs, supra; United States* v. *Bell*, 464 F.2d 667 (2d Cir. 1972), *cert. denied*, 409 U.S. 991 (1973); *United States* v. *Lindsey, supra.* It was only after the customs officer in conducting the initial "pat down" of Daniels located a bulge inside Daniels' right thigh that Daniels identified as powder that he was subjected to a further search during the course of which the heroin was found. At that point probable cause existed to pursue the matter further and require Daniels to submit to a more extensive search.[16]

A protective search for weapons incident to a brief detention based on reasonable suspicion may, of course, evolve into a full search for weapons or contraband if the detaining authorities suspicions rise to the level of probable cause. *United States* v. *Riggs, supra*, 474 F.2d at 704. This is precisely the 2-step "search" procedure approved by the Supreme Court in *Terry*, where the arresting officer did not place his hands under the outer surface of the garments until he had felt the weapons. See *United States* v. *Robinson*, 471 F.2d 1082, 1089-1090, n. 9 (D.C. Cir. 1972), *rev'd on other grounds*, 414 U.S. 218 (1973); *United States* v. *Walling*, 486 F.2d 229 (9th Cir. 1973), *cert. denied*, 415 U.S. 980 (1974).

It follows, under the circumstances, that the trial court properly denied the motion to suppress.

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[16] The rapidly unfolding events certainly demanded some responsive action by Agent Hammonds. Here, as in *Terry*, "It would have been poor police work indeed for an officer of . . . experience to have failed to investigate. . . ." 392 U.S. at 23. On the contrary, "it may be the essence of good police work to adopt [such] an intermediate response." *Adams* v. *Williams, supra*, 407 U.S. at 145.

POINT II

The chemist's report and analytical notes were properly received into evidence.

Appellant contends that the trial court erred when it permitted purportedly inadmissible hearsay in the form of a chemist's report identifying the substance seized from Isaac Daniels as heroin to be introduced into evidence at trial. Since the report and accompanying analytical notes constitute records of a regularly conducted activity of the United States Customs Service, lacking information extraneous to the chemical analysis, they were properly received into evidence in their entirety under the business records exception of the hearsay evidence rule.

Because of the unavailability [17] of the chemist who analyzed the substance seized from Isaac Daniels at La Guardia Airport on April 27, 1972, the Government called Shirley Harrington, a Customs chemist, for testimony as to the usual practices of her office regarding seizures of unknown substances (T. 453). Mrs. Harrington testified that it was the usual procedure of Customs to analyze unknown substances and identified a Customs laboratory report, marked Government Exhibit 12 (Government's Appendix, p. 1), and accompanying analytical notes, marked Government Exhibit 13 (Government's Appendix, p. 2), as documents prepared in the

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[17] Dr. Milton Weinberg, a retired analytical chemist with Customs, was unavailable to testify because of a serious bronchial condition. (T. 441-442). Though present on the day the case was initially called for trial, the unexpected length of the hearing on the motion to suppress and jury selection process resulted in Mr. Weinberg's discharge with a request that he return to testify when needed. At 10:30 A.M. on the morning he was to return, Dr. Weinberg called the United States Attorney's Office, described his condition and indicated he was unavailable to testify.

ordinary course of business (T. 453, 459. Those exhibits—over defense objections—were received in their entirety into evidence under the business records exception to the hearsay evidence rule (T. 465).

Rule 803(b) of the Federal Rules of Evidence provides in pertinent part that a report kept in the course of a regularly conducted business activity, if it was the regular practice of that business activity to make the report, is not excluded from evidence by the hearsay rule. The challenged documents plainly satisfy those requirements.

First, and perhaps foremost, the term "business" [18] certainly is broad enough to encompass the activities of the Customs Service. Further, the report and analytical notes, dated April 27, 1972, both appear on pre-printed forms (Customs Form 6415) designed especially for analyses of unknown substances. Taken with Mrs. Harrington's uncontroverted testimony regarding the customary practices of the Organic Division, one of Customs' five laboratory divisions, the Rule's dual requirement that the reports be "kept in the course of a regularly conducted activity, and . . . [that] it was the regular practice of that business activity to make the . . . report," is easily satisfied. Moreover, as a Customs chemist, Mrs. Harrington was undoubtedly qualified to testify as to these procedures; she was familiar with laboratory procedures and attested to the fact that chemical analysis and report of unknown substances was a routine matter. So long as she could identify the report as an authentic Customs report, she need not have personally kept the records, *United States* v. *Rosenstein*, 474 F.2d 705 (2d Cir. 1973); nor need she have certain knowledge of who

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[18] As used in the Rule, "business" is broadly defined and includes "business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit." Federal Rules of Evidence, Rule 803(b).

made the report. *United States* v. *Newman*, 468 F.2d 791 (5th Cir. 1972), *cert. denied*, 411 U.S. 905 (1973); *United States* v. *Blake*, 488 F.2d 101 (5th Cir. 1973).[19]

Differentiating between reports prepared by chemists and those prepared by "law enforcement personnel", such as narcotics agents or police officers, courts have held "bare" chemists reports admissible in evidence as a business records exception to the hearsay rule:

> There can be no doubt that exhibits or memoranda made by the chemist were admissible as having been made in the regular course of business and it was the regular course of business to make such memoranda or record of findings of the chemists analysis . . . . *United States* v. *Ware*, 247 F.2d 698, 699 (7th Cir. 1957).

The rule in this Circuit is the same and so long as the chemist's report contains no information extraneous to the chemist's analysis, it is admissible under the business records exception. See *United States* v. *Frattini*, 501 F.2d 1234, 1236 (2d Cir. 1974). Here, unlike the situation in *Frattini*, where this Court reversed a narcotics conviction because the chemist's report, as received in evidence, contained information concerning the facts of the alleged criminal transaction, the laboratory report, merely identifies the substance as "heroin hydrochloride (36.5%) admixed with lactose" and sets forth the respective weights of the substance as received and returned. The accompanying analytical notes, in the nature

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[19] Appellant's claim that, though Mrs. Harrington testified she recognized the handwriting of Milton Weinberg, (Federal Rules of Evidence, Rule 901(b)(2)), she had never worked with him or seen him write is of no consequence (T 470). Lack of personal knowledge of who made the report is no basis for its exclusion under the business records exception. *United States* v. *Newman, supra.*

of Customs Form 6415, on its face sets forth largely the same information and on its obverse side details only the underlying chemical computations. In both instances, there is no mention of extraneous matter.[20]

It follows that the chemist's report and underlying analytical notes were properly received in evidence.

POINT III

The trial court properly charged the jury on the presumption of innocence.

Appellant finally contends that the trial court failed properly to instruct the jury that the presumption of innocence continues with the defendant throughout trial and into its deliberations. Appellant's claim to the contrary notwithstanding, since the court's charge on the presumption of innocence plainly indicated that the presumption continues until the verdict, it was proper and complete in all respects. The claim that the charge was deficient is frivolous.

At a conference in chambers prior to the trial court's instructions to the jury, Judge Bramwell reviewed his charge *in toto* with counsel and entertained objections. At one point counsel for appellant objected to the trial court's instruction on the presumption of innocence (T 547) and requested that the court charge that "the defendant begins a trial with a clean slate, and the presumption of innocence remains throughout deliberation

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[20] Of course the defendant's sixth amendment right of confrontation may not be invoked to exclude evidence otherwise admissible under well-established exceptions to the hearsay rule. *See United States* v. *Leathers*, 135 F.2d 507 (2d Cir. 1943); *McDaniel* v. *United States*, 343 F.2d 785 (5th Cir. 1965), *cert. denied*, 382 U.S. 826 (1965); 5 Wigmore, *Evidence* § 1397 (Chadbourn rev. 1974).

of the jury until such time as the jury unanimously agrees that he is guilty." (T 547). Judge Bramwell refused to charge the jury in that form, (T 548) and instead charged:

> "A defendant is presumed innocent of a crime. Thus the defendant, although accused, begins the trial with a clean slate and with no evidence against him, and the law permits nothing but legal evidence to be presented before a jury to be considered in support of any charge against the accused, *so that the presumption of innocence alone is sufficent to acquit a defendant unless you, the jury, are satisfied beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of all the evidence in the case.*" (T 687) (emphasis supplied)

Manifestly, by charging that the presumption of innocence alone is enough to acquit unless the jury is satisfied beyond a reasonable doubt of the defendant's guilt, the trial court charged in substance that the presumption of innocence continues throughout the jury's deliberations. *Holt* v. *United States*, 218 U.S. 245 (1910); *United States* v. *Cummings*, 468 F.2d 274, 280 (9th Cir. 1972).

Since the jury instructions conformed in substance to the defense's request to charge, appellant's argument reduces to the claim that in failing to instruct the jury in the form requested by the defense, the court committed reversible error.[21] But the law is clearly to the contrary,

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[21] It is difficult to discern whether appellant assails the form of the judge's charge or a purported difficulty on the court's part in formulating a proper statement of the law. (Appellant's Brief p. 52). Whatever difficulties the court may have encountered outside the jury's presence in articulating its reasons for denying the defense's request, the charge as finally delivered plainly leaves no doubt that the presumption remains with the defendant until

[Footnote continued on following page]

and where the subject of a requested charge is adequately covered in the instructions given to the jury there is no error though the charge is delivered in other than the precise form requested. *United States* v. *Anglada*, 524 F.2d 296, 300 (2d Cir. 1975); *United States* v. *Cowles*, 503 F.2d 67 (2d Cir. 1974), *cert. denied*, 419 U.S. 1113 (1975). Absent a claim that the charge on the subject was somehow ambiguous or otherwise deficient, so as to create an erroneous impression in the minds of the jurors, *United States* v. *Peterson*, 513 F.2d 1133 (9th Cir. 1975), which we submit it is not, see *United States* v. *Cummings*, *supra*, 468 F.2d at 280, there clearly is no error.

CONCLUSION

The judgment of conviction should be affirmed.

Dated: June 25, 1976

Respectfully submitted,

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the jury arrives at its verdict. See *United States* v. *Cummings*, *supra*, 468 F.2d at 280. It is a novel contention that the trial judge's extemporaneous statements of the law outside the jury's presence can be used to assail otherwise unexceptional statements made in their presence.

* The United States Attorney's office wishes to acknowledge the invaluable assistance of Leonard F. Wallace and John A. Records in the preparation of this brief. Messrs. Wallace and Records are third year law students at New York University School of Law.

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

EVELYN COHEN, being duly sworn, says that on the 28th day of June, 1976, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a BRIEF FOR THE APPELLEE of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Talbot, Grant & McQuarrie, Esqs.
139 Cadillac Square
Detroit, Michigan 48226

Evelyn Cohen

Sworn to before me this
28th day of June, 1976

Carolyn N. Johnson

CAROLYN N. JOHNSON
NOTARY PUBLIC, State of New York
No. 41-4618298
Qualified in Queens County
Term Expires March 30, 1977